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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 UNITED STATES OF AMERICA,
11
12 vs. Plaintiff,
13 MISRAEL CERVANTES-
14 HERNANDEZ, Defendant.

CASE NO. 14cr3011 BEN

ORDER

15 Defendant has pleaded guilty to illegal reentry in violation of
16 8 U.S.C. §1326(a) and (b). In his sentencing memorandum, Defendant argues that in
17 performing the Sentencing Guidelines calculation he should receive a four-level
18 upward adjustment under USSG §2L1.2(a)(1)(D) for his prior conviction for seven
19 counts of first degree burglary in violation of California Penal Code § 459/460. The
20 probation officer and the Government disagree. The probation officer and the
21 Government take the position that the prior felony conviction qualifies as an
22 “aggravated felony” and should receive an eight-level upward adjustment under the
23 provisions of USSG §2L1.2(b)(1)(C).

24 Defendant argues that his prior California burglary conviction cannot qualify
25 as an aggravated felony because the Supreme Court determined that it is an
26 indivisible statute broader than the generic federal offense of burglary. *Descamps v.*
27 *United States*, 133 S. Ct. 2276 (2013). And because it is indivisible, the modified
28 categorical approach cannot be applied. *Id.*; see also *Rendon v. Holder*, 764 F.3d

1 1077, 1081 (9th Cir. 2014). Defendant is correct on this point.

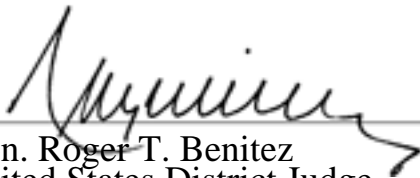
2 However, a first degree California burglary conviction still qualifies as an
 3 aggravated felony under the residual clause defining a crime of violence. According
 4 to the Application Notes for USSG §2L1.2(b)(1)(C), an aggravated felony is defined
 5 by looking to 8 U.S.C. § 1101(a)(43). In §1101(a)(43)(F) a crime of violence for
 6 which the term of imprisonment is at least one year, qualifies as an 8-level increase
 7 aggravated felony if it falls within the definition of the term “crime of violence” as
 8 defined in 18 U.S.C. §16. Section 16, in turn has a main clause and a residual
 9 clause. The residual clause of §16(b) describes: “*any other offense that is a felony*
 10 *and that, by its nature, involves a substantial risk that physical force against the*
 11 *person or property of another may be used in the course of committing the offense.*”
 12 (Emphasis added.)

13 The Ninth Circuit has previously decided that first degree burglary under
 14 California law is categorically a crime of violence as defined in the residual clause
 15 of §16(b) through § 1101(a)(43)(F). *See United States v. Ramos-Medina*, 706 F.3d
 16 932, 936-37 (9th Cir. 2013); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th
 17 Cir. 2011); *Chuen Piu Kwong v. Holder*, 671 F.3d 872 (9th Cir. 2011). And the
 18 Fourth Circuit recently agreed. *See United States v. Avila*, 770 F.3d 1100, 1107 (4th
 19 Cir. 2014) (“First-degree burglary, as defined in California Penal Code §§ 459 and
 20 460(a), is a crime of violence within the meaning of 18 U.S.C. § 16(b) and therefore
 21 qualifies as an aggravated felony. Accordingly, the district court correctly applied
 22 the eight-level enhancement under U.S.S.G. § 2L1.2(b)(1)(C) when it calculated
 23 Avila’s sentence.”). These decisions are left undisturbed by the Supreme Court’s
 24 *Descamps* decision because that decision concerned only the generic federal crime
 25 of burglary. It specifically did not address generic federal crimes described in a
 26 similar residual clause. *Descamps*, 133 S. Ct. at 2293 & n.6 (“The Government here
 27 forfeited an alternative argument that § 459 qualifies as a predicate offense under
 28 ACCA’s ‘residual clause,’ which covers statutes ‘involving conduct that presents a

1 serious potential risk of physical injury to another.’ We express no view on that
2 argument’s merits.”).

3 Therefore, Defendant’s prior California first degree burglary conviction
4 requires an eight-level increase under USSG §2L1.1(b)(1)(C). *See, e.g., Avila*, 770
5 F.3d at 1107; *United States v. Talmore*, No. 13-10650, 585 Fed. App’x 567 (9th Cir.
6 Oct. 23, 2014), *petition for cert. filed*, (Feb. 27, 2015) (“In [*United States v.*] *Park*
7 [649 F.3d 1175 (9th Cir. 2011)], we had held that California first degree burglary
8 qualifies as a ‘crime of violence’ because it falls under Section 4B1.2(a)’s ‘residual
9 clause.’ By its own terms, therefore, *Descamps* leaves *Park*’s holding
10 undisturbed.”); *United States v. Rodriguez-Frias*, No. 13-50189, 571 Fed. App’x.
11 536 (9th Cir. Apr. 23, 2014), *cert. denied*, 135 S. Ct. 978 (2015) (“We have
12 consistently held that residential burglary under California Penal Code § 459
13 involves a ‘substantial risk’ of the use of force, thus satisfying the requirements of
14 18 U.S.C. § 16(b) This case involves a violation of 8 U.S.C. § 1326 and the
15 definition of violence in the residual clause contained in § 16(b), which has slightly
16 different language than the residual clause in § 924(e)(2)(B)(ii). Therefore,
17 *Descamps* is not on its face clearly irreconcilable with our prior precedent.”).

18 DATED: March 12, 2015

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21 Hon. Roger T. Benitez
22 United States District Judge
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